[Published December 8, 1897.]

Kansas Court of Appeals, Southern Department, Central Division.

No. 217.

The Wellington Waterworks, plaintiff in error,
vs.
J. Q. Brown, defendant in error.

Error from Sumner County.

The opinion was delivered by Dennison, P. J.

1. A jury may, in considering their verdict, take into consideration the view of the premises, when a view is permitted by the trial court, and the results of their observation, in connection with the evidence produced before them.

2. A litigant cannot be heard to complain of an instruction, the substance of which he asked the court to give.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 672.

The State of Kansas, appellee,
vs.
Michael Branson, appellant.

Error from Kingman District Court.

AFFIRMED.

The opinion was delivered by Schoonover, J.

1. The information set forth, and held to be sufficient.

2. "Where two courts have concurrent jurisdiction of a criminal cause, the court first acquiring jurisdiction of the offense, and of the person of the defendant, retains jurisdiction until the final determination of the case to the exclusion of the other." (55 Kas. 358.)

3. "Some of the jurors had impressions or beliefs as to the commission of the offense charged which were not of a positive and fixed character, but were derived solely from rumor and newspaper statements, and they appeared to have been free from any bias or prejudice and to be able to fairly consider the testimony and render an impartial verdict in the case: Held, that the overruling of the challenge to the retention of such jurors is not sufficient ground for reversal." (54 Kas. 513.)

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 159.

Edward Cook, Caroline M. Cook and Thomas S. Krutz, plaintiffs in error,
vs.
Francis Blakely, et al., defendant in error.

Error from Harper County.

The opinion was delivered by Milton, J.

1. In a contest case involving the validity of an entry upon a tract of Osage Indian trust lands, it was not necessary to notify the mortgagee of the tract, when it did not appear that he had filed a statement of his interest in the local land office.

2. The return of the purchase money is not a condition precedent to the cancellation of the entry in question.

3. The decision of the land officers upon questions of fact in a contest case is conclusive upon the parties, and is not subject to collateral attack.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 267.

W. W. Waterfield, plaintiff in error,
vs.
The Hutchinson National Bank, defendant in error.

Error from Reno County.

The opinion was delivered by Milton, J.

Where in a case tried by a Judge pro tem the order of the court states that "the defendant was granted 225 days in which to make and serve the case-made for the Supreme court," and the case-made was settled by the Judge pro tem under such order, 294 days after the date thereof: Held, that the case-made is invalid.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 294.

Walter M. Pond, plaintiff in error,
vs.
The National Mortgage and Debenture Company and another, defendants in error.

Error from Reno County.

The opinion was delivered by Dennison, P. J.

1. No motion for a new trial is necessary to obtain a review of the finding of law, by the District court, that a service of summons upon a corporation by delivering a copy thereof to a vice president of said corporation is invalid.

2. In the absence of the president of a corporation it is the duty of the vice president to act as president, and at such times he is the chief officer of the corporation.

3. The service of a summons upon a corporation by delivering a copy thereof to the vice president, at a time when the president is absent from the company and could not be found by the Sheriff, is sufficient.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 208.

Martha A. Carter, administratrix, plaintiff in error,
vs.
Mary L. Carter, defendant in error.

Error from Marion County.

The opinion was delivered by Dennison, P. J.

1. The familiar doctrines, that the verdict of the jury which is sustained by some evidence and approved by the trial court will not be disturbed, and that a general objection to obstructions, some parts of which are correct, is not sufficient to obtain a review of the parts of the instructions complained of, are applied in this case.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 250.

Lucy P. Rhoades, plaintiff in error,
vs.
Carrie Rhoades, defendant in error.

Error from Butler County.

The opinion was delivered by Milton, J.

The case-made was settled by the trial Judge eighty-one days after his term had expired and eighty-nine days after final judgment, without notice to defendant in error or waiver of notice, the record being silent as to notice or waiver thereof, and as to the suggestion or waiver or suggestion of amendment, under an order made at the time of entering final judgment, as follows:

"And seventy days are given the defendant in which to make and serve a case for the Supreme court on the attorneys for plaintiff, and fifteen days thereafter are given plaintiff in which to suggest amendments, and the case to be settled on three day's notice in writing to be given by either side."

Held: that such case-made was settled too late under said order, and that the ex-Judge had no authority to settle the same without the notice (or waiver thereof) provided for in such order.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 736.

The State of Kansas, plaintiff,
vs.
Barney O'Connor, defendant.

Error from Sumner District Court.

AFFIRMED.

The opinion was delivered by Schoonover, J.

1. Where a person, under indictment or information for an offense, and held to answer on bail, consents to a continuance, he is not entitled to be discharged under section 5289, G. S. 1889.

2. The misconduct of the court or jury should be such as to raise a doubt in the mind of the court that the substantial rights of the parties may have been affected, before a new trial should be granted or case reversed.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 211.

Martha A. Carter, plaintiff in error,
vs.
L. Strom, et al., defendants in error.

Error from Marion County.

The opinion was delivered by Dennison, P. J.

1. The case of Map Co. vs. Jones cited and followed as to the duty of the District court to require the defendant to file an answer in a case appealed to it from a Justice of the Peace.

2. A verdict of the jury which has been approved by the trial court will not be disturbed where there is some evidence tending to support each fact necessary to sustain such verdict.

3. An assignment of error not specified and argued in the brief of plaintiff in error is considered waived.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 578.

City of Emporia, appellee,
vs.
Fred Haussler, appellant.

Error from Lyon County.

The opinion was delivered by Milton, J.

1. Where after a verdict of guilty in an action against appellant for selling liquor in violation of a city ordinance, the court adjourned sine die and sentence was pronounced on the verdict at the next regular term of the court, and where at said subsequent term of court appellant filed a motion in arrest of judgment (with a purported bill of exceptions annexed thereto) setting forth that the court had adjourned at the former term a day earlier than counsel for plaintiff and defendant had expected, and that in consequence no bill of exceptions was prepared, and that the court had by such adjournment before pronouncing sentence, lost jurisdiction to do so; Held, that the motion states no statutory ground for arrest of judgment, and that the same was properly overruled.

2. Where the trial court allowed and signed the purported bill of exceptions at such succeeding term, Held, that the same cannot be considered by the Appellate court. (State v. Smith, 38 Kas. 94.)

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 668.

The State of Kansas, appellee,
vs.
John Tegder, appellant.

Error from Sumner County.

The opinion was delivered by Dennison, P. J.

1. Where there is an abundance of competent evidence introduced which conclusively establishes a certain fact, it is immaterial that incompetent evidence is introduced to prove the same fact.

2. A court is justified in allowing counsel considerable latitude in his questions to an unwilling witness.

3. A complaint verified by a County Attorney upon information and belief, is sufficient for all purposes under the prohibitory law of Kansas, except to sustain a warrant when properly attacked.

4. To convict the defendant of maintaining a nuisance under the prohibitory liquor law of Kansas, the prosecution need not rely upon sales which the complaining witness had in mind at the time he verified the complaint

5. The instructions refused and given have been examined by us and no error found.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 220.

The Julius Winkelmeyer Brewing Association, plaintiff in error,
vs.
J. B. Nipp, defendant in error.

Error from Cowley County.

The opinion was delivered by Dennison, P. J.

1. A contract by which A agrees to sell certain packages of beer, etc., to B upon the terms and conditions therein stipulated, when ordered by B, is not a completed contract of sale until B accepts the offer by making an order.

2. The sale under such contract is not completed until the packages are separated and delivered to B.

3. Ordinarily a delivery of merchandise to the carrier is a delivery to the purchaser, but when the seller pays the freight, the carrier is his agent and the delivery is made at the place of its destination.

4. Where the freight charges are to be paid in the first instance by the purchaser, but were to be charged to the seller and deducted from the price of the merchandise; Held, that the seller pays the freight.

5. Where A sells intoxicating liquors to B and pays the freight upon them to Wichita, Kansas: Held, that the sale is made at Wichita.

6. A brewing company which furnishes a person with barrels and kegs to be retained by such person until the contents are sold or disposed of, and then to be returned to said brewing company, aids such person in the sale or disposal of such contents and also knows that such person is not to sell such contents in the packages which belong to said brewing company.

7. Where a petition sets out a sale of intoxicating liquors in original and unbroken packages in car-load lots, under a contract set out in said petition, in an action to recover the balance due thereon, and where there is no allegation in such petition that the intoxicating liquors were to be, or were, used by the purchaser for the purpose of making illegal sales thereof, and there is nothing in the contract of sale to charge the seller with notice that the purchaser intended to use the liquors for an illegal purpose, and where the petition is otherwise sufficient: Held, that the court erred in sustaining a demurrer to such petition.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 201.

Charles A. Scruton, plaintiff in error,
vs.
Sallie J. Hall, defendant in error.

Error from Cowley County.

The opinion was delivered by Dennison, P. J.

1. This court will take judicial knowledge of the fact that the term of the Cowley county District court, which follows December, 1891, term, commenced in April, 1892. As proceedings were had in said court on January 30th, the term had not expired on January 29th.

2. In computing the time given by the court to make and serve a case-made, the first day is excluded and the last day is included, and where the last day is Sunday it is also excluded.

3. Where a record is properly settled by the trial Judge after the waiver of amendments by the defendant in error, we will not revise or alter the record, when no motion with sufficient notice has been filed for that purpose, and when no irreparable injury is being done, even though the amendment may relate to those things which make the case reviewable in this court.

4. The court must instruct the jury in writing if requested by either party. The case of Wheat vs. Brown, 3 Kas. App. 431, and Rich vs. Lappin, 43 Kas. 666, and the authorities there cited, followed.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 591.

Thomas L. Sparks, plaintiff in error,
vs.
Clara Sparks, defendant in error.

Error from Barber County.

MOTION TO DISMISS SUSTAINED.

1. Where neither evidence nor allegation is found in the record to show that the amount or value in controversy is over $100, and there is no certificate in the record showing the case to belong to one of the excepted classes mentioned in section 542a of the Civil Code, it must be dismissed. (Packard v. Packard, 56 Kan. 132.)

2. The certificate referred to in the foregoing paragraph cannot be considered unless it was filed with, and as a part of, the record in the case sought to be reviewed.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 740.

The Farmers' Alliance Insurance Company, a corporation, plaintiff in error,
vs.
H. V. Nichols, defendant in error.

Error from McPherson County District Court.

DISMISSED.

The opinion was delivered by Schoonover, J.

Where the term of the District Judge trying a case expired, when no time had been fixed by the order of the court for settling and signing a case: Held, that the Judge whose term of office had expired was without authority to settle and sign the same.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 621.

F. M. Strong, plaintiff in error,
vs.
The First National Bank of Arkansas City, Kansas, defendant in error.

Error from Cowley District Court.

DISMISSED.

The opinion was delivered by Schoonover, J.

The time given in section 4657 G. S. 1889 in which proceedings shall be commenced to reverse, vacate or modify judgments or final orders is sufficient for the careful and diligent notwithstanding the mistakes and misunderstandings which are liable to occur and cause delay, and cannot be extended.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 228.

Hiram F. Hatch, receiver of the American National Bank of Arkansas City, Kansas, plaintiff in error,
vs.
S. C. Smith, defendant in error.

Error from Cowley District Court.

REVERSED.

The opinion was delivered by Schoonover, J.

Order of trial Judge discharging an attachment, reversed on the facts of the case.

Attest: W. A. AYRES,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Central Division.

No. 627.

A. P. Johnson and Nannie J. Johnson, plaintiffs in error,
vs.
John W. Jones, Sheriff of Reno County, Kansas, defendant in error.

Error from Reno County.

AFFIRMED.

The opinion was delivered by Milton, J.

1. Where the record fails to show whether or not the debts due the execution creditors were contracted before or after the date of an alleged fraudulent transfer by the debtor to his wife of his property: Held, that such creditors should be regarded as subsequent creditors with reference to such transfer.

2. Where the record does not contain the bill of sale by which the debtor transferred the property in controversy to his wife, although it was read in evidence at the trial, and where it appears that such bill of sale had been recorded: Held, that it will be presumed not to have been such an instrument as imparted constructive notice by reason of its being recorded.

2. Where the debtor was a joint partner